IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1452

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,
NATIONAL FREIGHT CLAIM COUNCIL OF
AMERICAN TRUCKING ASSOCIATIONS, INC.
Petitioners

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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April 23, 1979

DI CESARE - Printing — 331-6101 — Washington, D.C. 20006

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

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Respondent Drug and Toilet Preparation Traffic Conference, intervenor in the proceedings below in the United States Court of Appeals for the District of Columbia Circuit, submits that Petitioners raise no special or important issues which warrant review by this Court on a writ of certiorari.

OPINIONS BELOW

Review has here been sought of the decision of the United States Court of Appeals for the District of Columbia Circuit in

National Motor Freight Traffic Ass'n, Inc. v. *ICC*, which has been reported at 590 F.2d 1180 (1978). The slip opinion is reprinted in Petitioners' Appendix at pp. 1a-13a. That opinion affirmed the decision and declaratory order of the Interstate Commerce Commission in *Drug and Toilet Preparation Traffic Conference — Petition for Declaratory Order — Liability Limitation*, 353 I.C.C. 536 (1977), reprinted in Petitioners' Appendix at pp. 15a-46a.

STATUTORY PROVISION

Petitioners include in the appendix to their petition relevant sections from the Interstate Commerce Act as recodified and revised pursuant to Public Law 94-473, 92 Stat. 1337 (1978). Though substantially unchanged, the new provisions do not contain all the language of the old provisions discussed by the Interstate Commerce Commission in its declaratory order and by the Court of Appeals on review. For convenience, Section 20(11) is reprinted in the Appendix to this brief. Section 20(11) was made applicable to motor carriers by Section 219 of the Act, 49 U.S.C. Section 319, which is also reprinted.

QUESTION PRESENTED

Did the court below err in applying the "arbitrary and capricious" standard in its review of an order of the Interstate Commerce Commission interpreting one of the Commission's own orders?

STATEMENT OF THE CASE

Section 20(11) of the Interstate Commerce Act codified the common law rule that common carriers are fully liable for loss or damage to freight caused by them in the course of transportation.

It declared unlawful and void attempts by carriers to limit that liability. The section includes an exception to this rule of full liability for shipments made at ICC-ordered rates which declare therein a "released" value for the property. Two things are necessary before carriers may lawfully limit their liability: an order by the ICC designating a released valuation limit and a written indication by the shipper assenting to the released valuation. In such a case, carrier liability is limited to an amount not exceeding that "released" value.[1]

In 1952, the carriers applied for an order authorizing such an arrangement for shipments of drugs, medicines, toilet preparations and similar "articles" (*i.e.*, commodities listed in the carriers' application). The released value requested for such shipments was "50 cents per pound for each article" shipped.

The Commission granted the relief requested in the carriers' application by issuing its Released Rates Order No. MC-342, on

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[1]The relevant language from Section 20(11) reads as follows:

> [T]he provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply *** to property *** concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released *** and the Commission is hereby empowered to make such orders in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation.

August 13, 1952, which adopted and prescribed "the released value of the property, as specified in the said applications"[2]. The released valuation so adopted was specified in the carriers' application as follows:

> The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding 50 cents per pound for each article.

This provision was duly published in carrier tariffs and, on numerous shipments over the years, the shippers have tendered shipments on bills of lading showing the language quoted above.[3]

While everyone agrees that, in the event of total loss of a shipment, the released valuation limit is set at 50 cents multiplied by the weight of the commodity shipped, a dispute arose as to how the valuation limit applies in situations where only a part of the shipment is lost or damaged. Rather than bringing individual loss and damage suits in court, where the court would have been required to refer the interpretation issue to the Commission as a matter of primary jurisdiction, this shipper Conference elected to resolve the issue directly by petitioning the Commission for a declaratory order interpreting its released valuation order.

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[2]The Released Rates Applications Nos. MC-524 and 525 and ICC Released Rates Order No. MC-342 were attached as Appendix A to the Commission's declaratory order here at issue, at 353 I.C.C. 548-555, and appear in Petitioners' Appendix at pp. 32a-44a.

[3]Petitioners discuss at length (Petition at pp. 3-4) the tariff items in which these provisions are published, apparently in an effort to suggest that the true wording of the released value is "50 cents per pound". However, the full statement of the released value, "50 cents per pound for each article", does appear in the carrier tariff, and it is this latter formulation, including the clause "for each article" that was adopted by the Commission's order in 1952, including a requirement that such wording be inserted on the bill of lading.

Three different interpretations of this released valuation order were discussed in the Commission proceedings. Under Theory A, "50 cents per pound for each article" means 50 cents per pound times the weight of the commodity in the shipment. Since "article" was used to mean commodity throughout the carrier applications seeking the released valuation order in the 1952 proceeding, "article" is read as meaning "commodity" in measuring damages in cases of partial loss.[4] Under Theory B, "50 cents per pound for each article" means 50 cents per pound times the weight of each damaged case or carton in the shipment. Though there is no support in the Commission's 1952 order or in the carriers' applications for this reading, it is not unusual for other released value provisions to be stated on a per case or carton basis.

Under Theory C, "50 cents per pound for each article" was argued to mean 50 cents per pound times the weight of each damaged bottle or item in the shipment. Here, again, there is no support for this reading in the Commission's 1952 order or in the carriers' applications. But a number of other released valuation orders which limit liability to, *e.g.*, "50 cents per pound", and do not include the "for each article" language, have been read as being based on the weight of only the damaged portion of the shipment.

The effect of these various interpretations is illustrated in the Court's opinion below (590 F.2d at 1183, Petitioners' Appendix at pp. 4a-5a) by applying each of them to a hypothetical shipment. The illustration used by Petitioners at page 5 of their Petition is incomplete, since it omits any discussion of Theory B. Petitioners go on to characterize as anomalous the possibility that, under Theory A, a shipper could recover his actual damages. However, this result is also possible under Theory B. Further, the carriers' argument is that they are entitled to a whole

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[4]See the Commission's discussion of this usage at 353 I.C.C. 542, Petitioners' Appendix pp. 23a-24a.

series of released valuation limits, one for the whole shipment and an infinite series of valuations dependent on the weight of each lost and damaged portion. There is nothing in the statute which suggests that more than one valuation limit for each shipment is required or that the valuation limit be different in the case of a partial loss.

In any event, after extensive analysis of the issues and of the evidence of the various parties, the Commission issued a declaratory order holding Theory A correct.[5] In so doing, it found that the word "article" had been used consistently throughout the carriers' application in 1952 as synonomous with "commodity". The carriers appealed, and on December 20, 1978 the United States Court of Appeals for the District of Columbia affirmed the Commission's order.[6] It is that decision which Petitioners challenge.

REASONS FOR DENYING THE WRIT

In support of their contention that a writ of certiorari should issue, Petitioners make two contentions: first, that the Court of Appeals should not have applied the arbitrary and capricious test of the Administrative Procedure Act in its review of the Commission's declaratory order; and, second, that the interpretation of the released valuation order adopted by the Commission is in conflict with a decision of the Court interpreting a differently worded released valuation limitation many years ago. Both contentions are without merit.

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[5] *Drug and Toilet Preparation Traffic Conference - Petition for Declaratory Order - Liability Limitation*, 353 I.C.C. 536 (1977) Petitioners' Appendix pp. 15a—46a.

[6] *National Motor Freight Traffic Assn., Inc. v. I.C.C.*, 590 F. 2d 1180 (D.C. Cir. 1978).

I.

THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW

Petitioners' challenge to the test employed by the Court of Appeals in reviewing the Commission's order proceeds from a number of misconceptions. The first thing to be understood about Petitioners' threshold point — that the Commission's order is an "interpretative guideline" rather than a "legislative rule" and, as such, entitled only to limited judicial deference — is that this contention appears for the first time in their petition for a writ of certiorari. Not only did Petitioners fail to argue this "interpretative rule" theory before the Court of Appeals, but the Argument section of their March 20, 1978 brief in that court began (at page 14) with the heading: "The Commission's Order is Arbitrary and Capricious." Petitioners should not now be heard to challenge a standard of review they themselves argued was proper in the court below. See *United States* v. *Fleishman*, 339 U.S. 349, 365 (1950).

Even if this Court were now to consider *de novo* this argument of Petitioners, certiorari would still not be warranted. This is because the argument is wrong — the standard applied by the Court of Appeals was correct — and, furthermore, the standard now advocated by Petitioners would not produce a different result.

At pages 6-7 of their Petition, Petitioners cite Professor Davis' Administrative Law Treatise (1978 Supplement, at pp. 257-258) for the proposition that agency findings are not binding on courts "when Congress has not delegated to an agency the power to make law through rules". What Petitioners would overlook or obscure is that Section 20(11) is a specific delegation of legislative authority. Indeed, Section 20(11) does not just allow the Commission to issue orders, it requires that it do so. Only where a carrier acts pursuant to a specific Commission order

issued under Section 20(11) may it limit its liability. What the Commission was doing here was interpreting its own order which it had issued in 1952. It is beyond cavil that the 1952 order was a legislative rule, inasmuch as the Commission entered a released valuation order pursuant to the express direction of Congress in Section 20(11). The Commission now employed the declaratory order procedure, which it was entitled to use under Section 5 of the Administrative Procedure (5 U.S.C. Section 554(e) "with like effect as in the case of other orders", to clarify or interpret its earlier released rates order. In effect, it was simply amplifying its 1952 order to make it clearer; and in so doing was exercising precisely the same legislative authority it had performed under Section 20(11) in initially issuing the order in 1952.

The Commission's order does not resemble the "guidelines" discussed by this Court in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), and in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), the cases on which Petitioners rely for support of their argument. In the first place, those cases involved *guidelines*, promulgated informally, without Congressional authority. In the second place, in neither instance was the Court being asked to review an agency decision in the case at hand. Instead, the Court was considering what collateral effect such general pronouncements might have in disputes between private parties. The guidelines themselves were not before the court for review.

Here, in contrast, the ICC issued an *order* (not a guideline or interpretative bulletin) which is the product of lengthy adversary proceedings arising out of statutory authority over released value limitations on carrier liability. The parties now before this Court — Petitioners National Motor Freight Traffic Association and National Freight Claim Council and Respondent Drug and Toilet Preparation Traffic Conference — fully developed the record before the Commission, consisting of written testimony, extensive exhibits and briefs. Thus, rather than being in the nature of some sort of staff guideline issued *sua sponte*, this was the typical litigated administrative proceeding, as Petitioners

recognized when they followed the classic appellate route of filing an appeal to the Court of Appeals from an administrative agency's decision.

Thus, it is entirely proper that the Court of Appeals considered the Commission's determination entitled to deference[7] The Court of Appeals here, unlike the courts in *Skidmore* v. *Swift & Co.* and *General Electric Co.* v. *Gilbert, supra*, had agency "actions, findings and conclusions" directly before it. Under Section 10 of the APA (5 U.S.C. Section 706(a)(A)) the arbitrary and capricious standard of review was correct.

II.

PETITIONERS' SUBSTANTIVE ARGUMENTS ARE WITHOUT MERIT

Petitioners proceed from the discussion of the assertedly excessive deference given the Commission by the Court of Appeals to a discussion of asserted defects in the Commission's decision (which they say went uncorrected by the court as a result of its reluctance to substitute its judgment for the Commission's)[8].

[7]See, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), as to orders, and *United States* v. *North Carolina Granite Corp.*, 288 F. 2d 232, 235 (4th Cir. 1961) as to tariff construction.

[8]Petitioners also make reference (Petition at 10-11) to three class actions now pending against a number of carriers, which grew out of the Commission's interpretation of the carriers' limitation of liability. Throughout the instant litigation, this Respondent has taken the position that the carriers preference for Theory C, which minimizes their liability, was self-serving and unsupported by any evidence. The Commission agreed, and the Court of Appeals affirmed the Commission. These decisions notwithstanding, the nation's carriers continue, *to this day*, to pay shipper loss and damage claims under Theory C. It was to recover the valuation found just by the Commission, but unlawfully withheld by carriers while time-consuming avenues of appeal have been followed by the carriers, that those three class actions were filed.

The asserted defect on which Petitioners place most weight — an alleged conflict between the Commission's order and this Court's decision in *Western Transit Co.* v. *Leslie & Co.*, 242 U.S. 448 (1917) — is based on a fiction. The Court of Appeals did not, as Petitioners imply, defer to the Commission to the extent of allowing it to overrule a decision of this Court. It simply found no conflict. That being the case, it is nonsense to suggest that a different standard of review would have produced a different outcome.

Petitioners say (at p. 11) that the Commission's decision conflicts with the "ratio method of determining damages determined by this Court in the *Western* case." There is no "ratio method of establishing damages." The Court in *Western Transit* found that the released value used in that case — "$100 per net ton" — should not be read as setting a valuation limit based on the entire weight of the shipment. As the Court of Appeals properly observed in the instant case:

> *Western Transit* must be read in the light of the limitation provision there involved — one with no language even arguably pointing to a whole shipment standard. Here, there was the additional element of the phrase "for each article". The Commission was therefore presented with a question of interpretation not raised by the less ambiguous terms of the *Western Transit* provision. 590 F.2d at 1185, Petitioners' Appendix at p. 2a.

Petitioners' other assignments of error — two assertedly "fatal defects" in the Commission's decision discussed at pp. 12-13 of their Petition — are equally baseless.

First, Petitioners for the first time attempt to argue that the correct statement of the released value in dispute here is "50 cents per pound", not "50 cents per pound for each article." Here, again, they have raised an argument before this Court that was

not raised before the Commission or the Court of Appeals and, therefore, should not be considered by this Court. Throughout this entire litigation all parties have always focused upon the issue of the significance of the words "for each article". Having lost their argument on that issue before the Commission and the Court of Appeals, they would now fashion an argument to the effect that these words are not really a part of the released valuation.

In any event, the allegation is groundless. Section 20(11) clearly states that the carriers' liability is limited "to an amount not exceeding the value....declared or agreed to" by the shipper. The value declared or agreed to by the shipper is 50 cents per pound for each article, the valuation that appears on the bill of lading. That same valuation was proffered in the carriers' application and was adopted by the Commission in its order in 1952. It is this value, then, that established the upper limit of carrier liability.

Next, Petitioners state that the Commission failed to give any positive reason why the phrase "for each article" means that damages are to be measured by the weight in the shipment of the damaged commodity. This is simply not true. The Commission's decision gives a number of positive reasons for its interpretation of the phrase "for each article". They are summarized in the following paragraph:

> In adopting a construction of the word "article" as used in our 1952 order in No. MC-342 and in related items of the National Motor Freight Classification, we have given consideration to the circumstances surrounding the transportation of the property involved, including the context in which the word was used in the application to which the order responds, the language used in exceptions and commodity tariffs naming released rates on the same list of commodities, and the possible impact of such a construction upon the carriers and members of the shipping public.

CONCLUSION

For the foregoing reasons, Petitioners' request for a writ of certiorari should be denied.

Respectfully submitted,

DRUG AND TOILET
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Dated: April 23, 1979

APPENDIX

Section 20, par. (11) (49 U.S.C. § 20(11)) Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim.

Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transporatation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transporatation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading,

notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filled with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided,* That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tarifff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary

livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further,* That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further,* That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the linehaul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further,* That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided.

Section 219 (49 U.S.C. § 319) Application of section 20(11) and (12) of this title to common carriers by motor vehicle.

The provisions of section 20(11) and (12) of this title, together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of those persons to which such provisions are specifically applicable.